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JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES.

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OCTOBER TERM, 1896.

EX PARTE KINGMAN & COMPANY,
PETITIONER.

PETITION FOR WRIT OF CERTIORARI.

JAMES H. McINTOSH,
Attorney for Petitioner.

Baker, Printer, N. Y. Life Building, Omaha.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1896.

EX PARTE KINGMAN & COMPANY, PETITIONER:

Petition for writ of certiorari requiring the Circuit Court of Appeals for the Eight Circuit to certify to the Supreme Court for its review and determination the case of *Kingman & Company, Plaintiff in Error, vs. The Western Manufacturing Company, Defendant in Error.*

To the Honorable the Supreme Court of the United States:

The petition of Kingman & Company respectfully shows to this Honorable Court as follows:

I. That on the 17th day of February, 1894 The Western Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, and a resident and citizen of Nebraska, commenced an action in the District Court for Lancaster County, Nebraska, against your petitioner, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a resident and citizen of Illinois, for damages for breach of contract, the amount in controversy therein, exclusive of interest and costs exceeding the sum or value of Two Thousand Dollars; that your petitioner duly removed said cause into the Circuit Court of the United States for the District of Nebraska on the ground of diverse citizenship.

II. That issues were duly joined between said parties

in said cause in said Circuit Court of the United States for the District of Nebraska, and such proceedings were had therein that said cause duly came on for trial before a jury at the May, 1895, Term of said Court, resulting in a verdict against your petitioner, on the 4th day of June, 1895, of said May Term, for the sum of $1,996.66. On the coming in of said verdict, the Court, according to its usual custom in jury trials, at once rendered a judgment on said verdict.

III. Your petitioner further says that within three days after said verdict and judgment, and on the 6th day of June, 1895, it being still the May, 1895, Term of said Court, your petitioner duly filed its motion in said cause, to vacate and set aside said judgment and for a new trial, for the several reasons in said motion stated.

IV. Said motion for a new trial was entertained by the Court, was duly presented on its merits by counsel for the respective parties, and thereupon at the November, 1895, Term of said Court, and on the 11th day of December, 1895, the following entry was made in said case, to-wit:

"THE WESTERN MANUFACTURING COMPANY,

vs. 226—Q.

"KINGMAN & COMPANY.

"This cause having been heard on the motion of the de-
"fendant to set aside the judgment and the verdict, and for a
"new trial herein, was argued and submitted to the Court by
"the attorneys for the respective parties, whereupon after
"careful consideration thereof, and being fully advised in the
"premises, it is now on this day considered, ordered and ad-
"judged by the Court that the said motion be and the same is
"hereby overruled, and that the judgment heretofore entered
"herein, be and remain absolute."

V. On the next day after the above order overruling said motion, an order was entered giving your petitioner thirty

days from that date, December 12th, in which to prepare and present its bill of exceptions.

VI. Your petitioner prepared its bill of exceptions which was duly served on the attorneys for The Western Manufacturing Company and was by them "Dec. 30, 1895, returned without amendment," was presented to the trial judge for his signature January 9th, 1896, and was by said judge allowed and filed January 11th, 1896.

VII. Your petitioner's Petition for Writ of Error, Assignment of Error, Bond on writ of Error, were filed, the bond approved, and the Writ of Error duly allowed, all on January 20th, 1896. The citation was duly issued, served, returned, and filed January 22d, 1896. The record was filed in the Court of Appeals March 14th, 1896, and was duly printed.

VIII. Thereafter and on the 1st of May, 1896, The Western Manufacturing Company filed its motion in the Court of Appeals which, omitting the caption, was as follows:

"Comes now the defendant, The Western Manufacturing "Company, and moves the Court for an order dismissing this "appeal for the following reasons:

"1st. Because the Court has no jurisdiction of the said "cause.

"2nd. Because more than six months intervened be-"tween the date of the rendition of the judgment in said "action and the date of allowing and taking out the writ of "error in said cause.

"3rd. Because more than six months intervened be-"tween the date of the rendition of judgment in said cause "and the filing of any assignments of error in said cause in "the Circuit Court.

"4th. Because more than six months intervened be-

"tween the date of the entry of judgment in said cause and "the filing of the petition for writ of error in said cause in "the Circuit Court.

"5th. Because more than six months intervened be- "tween the date of the entry of the judgment in said cause "and the time of filing the supersedeas bondin said cause.

"6th. Because more than six months intervened be- "tween the time of the entry of judgment in said cause and "the showing of citation therein.

"WALTER J. LAMB,
"*Atty. for the Western Mfg. Co.*
"Defendant in Error."

IX. Said cause duly came on to be heard on the foregoing motion. May 21st, 1896, the motion was sustained, and the writ or error "was dismissed with costs for want of jurisdiction." Your petitioner duly filed a petition for a rehearing of said motion, but a rehearing was denied by an order entered September 21st, 1896, and upon motion of counsel for your petitioner an order was duly entered staying mandate until the first Monday in November, 1896.

A certified copy of the entire record of the said case in said Circuit Court of Appeals in pursuance of which said order of dismissal was made, is herewith furnished, as a part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeals.

X. The question thus presented by the record in the case of your petitioner was and is, Whether the time for suing out a writ of error for the review of a judgment in an action at law, in those districts where it is customary to enter judgment at once on the return of the verdict and to entertain and rule upon motions for new trials when they are filed within three days after the entry of the judgment, commences to run from the date of the entry of the judgment, or from the date of the

order overruling the motion for a new trial. The said Circuit Court of Appeals held that the time for suing out the writ of error commenced to run on the date of the entry of the judgment; whereas your petitioner is advised and believes and humbly submits that the judgment is not final until the motion for a new trial is overruled, and that therefore the time for suing out the writ of error commences to run on the latter date. And your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination of said order dismissing said writ of error, under and in conformity with the provisions of the sixth section of the Act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

XI. By the eleventh section of the act establishing the Circuit Courts of Appeal, it is provided, that no appeal or writ of error shall be taken of sued out except within six months after the entry of the judgment or decree sought to be reviewed. Thus, the time for taking an appeal and for suing out a writ of error is the same, regulated by the same section of the same act, in the same language.

XII. Your petitioner is advised and believes and humbly submits that there is no distinction between the effect of a motion or petition for a rehearing in a suit in equity, and a motion for a new trial in an action at law, that is seasonably made and entertained by the court. This Honorable Court has often held that when a motion or petition for rehearing was seasonably made in a suit in equity and entertained by the court, the time for appeal did not begin to run until the mo-

tion or petition was disposed of; for that until then the decree did not take final effect for the purpose of the writ of appeal.

Northern Pacific Railroad Co. v. Holmes, 155 U. S., 137.

Voorhees v. Manufacturing Co., 151 U. S., 135.

Aspen Mining & Smelting Co. v. Billings, 150 U. S., 31.

Texas & Pacific Railway Co. v. Murphy, 111 U. S., 488.

Goddard v. Ordway, 101 U. S. 745.

Memphis v. Brown, 94 U. S., 715.

Slaughter House Cases, 10 Wall., 273.

Brockett v. Brockett, 2 How., 238, 249.

In *Aspen Mining & Smelting Company v. Billings*, *supra*, your Honors stated the rule in the following language:

"The rule is, that if a motion or a petition for rehearing "is made or presented in season and entertained by the court, "the time limited for a writ of error or appeal does not begin "to run until the motion or petition is disposed of. Until then "the judgment or decree does not take final effect for the pur- "pose of the writ of appeal."

XIII. Your Honors do not seem to have deemed it necessary that the motion or petition should be disposed of at the term at which the judgment or decree was entered, for in most, if not all, of the cases above referred to, the motion or petition was not disposed of until a term subsequent to the term at which the judgment or decree was entered. Apparently the rule is without qualification, that the motion suspends the judgment so that it does not become final until the motion is disposed of.

XIV. On this question there is not merely an apparent difference of opinion between this Honorable Court and the

Honorable the Court of Appeals for the Eighth Circuit, but also between the Court of Appeals for the Eighth Circuit and the Fifth and First Circuits.

In *Louisville Trust Company v. Stockton*, 18 C. C. A., 408, Fifth Circuit, error to the Circuit Court of the United States for the Southern District of Florida, "the judgment in the court below was rendered on the 1st day of May, 1895," which was the February 1895 term of said court, and thereupon a motion for a new trial was entered, which was overruled at the May 1895 term of said court, on the 2nd of June of said term. "The citation directing the defendant in error to answer in this court was signed and issued on the 9th day of November, 1895, more than six months after the entry of the judgment sought to be reviewed, but within six months from the date when the motion for new trial was overruled." A motion was made to dismiss the writ of error because it had not been sued out until more than six months after the entry of the judgment. The motion was overruled because "the time limited for suing out a writ of error does not begin to run while there is a motion for a new trial pending."

Andrews v. Thum,, 18 C. C. A., 566, First Circuit, appeal from the Circuit Court of the United States for the District of Massachusetts, was sought to be dismissed because the appeal was not taken within six months from the entry of the decree, but the motion was overruled, because the "decree was suspended by a motion for rehearing, and did not take effect and become operative till that motion was overruled."

XV. The importance and gravity of this question arises not merely from the fact that it is a question of jurisdiction, but also from the further fact that it is and has been the practice in the Circuit Court for the District of Nebraska, and as your petitioner is informed and believes, is and has been the practice in actions at law in the Circuit Court for every District

in the Eighth Circuit, except the District of Minnesota, to file a motion for a new trial as was done in this case, and to defer proceedings in review until after the motion was disposed of. It is likely that this same practice prevails in other Circuits than the Eighth. Your petitioner is advised and believes that this has been deemed the proper practice by the bench and the bar of the districts where it prevails in this Circuit. So that if the judgment of the Court of Appeals in this case is correct, is it not likely that there are numerous cases appearing to have been finally adjudicate on their merits in the Court of Appeals, wherein in fact that Court was without jurisdiction thereof?

Again. The decisions of this Honorable Court on this question have been for the most part, your petitioner believes have been exclusively, in appeal cases. In view of the diversity of decision in the different Circuits in respect of writs of error, your petitioner respectfully submits that it is manifestly in the interest of jurisprudence and uniformity of decision that the question of the just construction of the eleventh section of the Act Establishing Circuit Courts of Appeals, in respect of the date upon which in actions at law wherein after entry of judgment on the return of the verdict a motion for a new trial is seasonably filed and entertained by the court, should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of said question on the part of your petitioner and its adversary herein.

Wherefore your petitioner respectfully prays that a Writ of *Certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eight Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, en-

titled, Kingman & Company, plaintiff in error, *versus* The Western Manufacturing Company, defendant in error, number 763, to the end that the judgment of said court dismissing said writ of error may be reviewed and determined by this court, as provided in Section 6 of the Act of Congress establishing Circuit Courts of Appeals, or that your petitioner may have such other or future relief or remedy in the premises as to this court may seem appropriate, and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court, and that said Circuit Court of Appeals may be directed to reinstate said writ of error and cause the same to be set down for hearing on its merits.

And your petitioner will ever pray, etc.

KINGMAN & COMPANY,

By .....

Attorney and Counsel for Petitioner.

OF COUNSEL:

STATE OF NEBRASKA, }
DOUGLAS COUNTY. } ss.

James H. McIntosh, being duly sworn, says that he is one of the attorneys and of counsel for Kingman & Company, the petitioner above named, and as such had personal charge for it of the case in the foregoing petition mentioned in the Circuit Court of the United States for the District of Nebraska, and in the United States Court of Appeals for the Eighth Circuit; that he has read the foregoing petition; and that the facts therein stated are true to the best of his information and belief.

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Subscribed and sworn to before me this 16th day of October, 1896.

Notary Public.